FILE COPY

No. 470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NORTHWEST PETROLEUM ASSOCIATION, ET AL, *Appellants*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

Appeal from the District Court of the United States for the District of Minnesota.

BRIEF FOR THE NORTHWEST PETROLEUM ASSOCIATION AND OTHER INTERVENERS AGAINST THE INJUNCTIVE RELIEF SOUGHT

PETER B. GARBERG,
For Farmers Union Cooperative Oil Companies.

ELWIN E. HADLICK,
KARL KNOX GARTNER,
For Northwest Petroleum Association.

BEE J. W. STOWELL PRINTING COMPANY, FREDERALSBURG, MD.

INDEX

	Page
Statement	1
Points Relied On Upon This Appeal	4
I	4
II	4
Synopsis Of The Argument	4, 5
Argument	5
I. The Commission, In Denying The Petition To Rehear Filed By The Four Railroads, Did Not Abuse The Discretion Vested In It To Allow Or Deny Rehearings Because The New Evidence Which Was Thereby Sought To Be Offered Was Immaterial And Irrelevant	5
II. The Interpretation Placed By The District Court Upon The Decision Of This Court In A. T. & S. F. Ry. Co. v. U. S. 284 U. S. 248 And The Application Of The Holding Therein Made By Said Court In This Case Amounts To A Preemption By The Courts Of The Field Of Rate Making Which Under The Constitution Is Vested Solely In Congress	12
III. In The Light Of All Of The Circumstances By Which Its Action Was Necessarily Governed, It Can Not Rightly Be Held That In Denying The Petition To Rehear In Question, The Commission Denied These Petitioners A Full Hearing On The Alleged Changed Economic Conditions (Diminishing Carrier Revenue And Earnings)	18
IV. The District Court Was Right In Denying The Injunction On The Other Grounds Stated In The Petition	35
Conclusion	40

TABLE OF CASES CITED

	Page
Ann Arbor R. Co. v. U. S., 281 U. S. 658	15
A. T. & S. F. Ry. Co. v. U. S., 284 U. S. 248 (The Grain Case)	3, 5, 11, 13, 14, 15, 16, 17, 18, 19
Corporation Comm. of Va. v. C. & O. Ry. Co., 40 I. C. C. 24, 28	36
Docket No. 17304, International Oil Co. et al v. Abilene & Southern Ry. Co. et al	2
Fifteen Percent Case, 1931, Ex Parte No. 103, 179 I. C. C. 215	9, 19, 20, 21
Great Northern Pac. Ry. Co. Acquisition, 162 I. C. C. 37, 71	23
I. C. C. v. Union Pacific R. Co., 222 U. S. 541, Page 549	8, 11, 12, 13, 15
I. C. C. v. Illinois C. R. Co., 215 U. S. 470	13
I. C. C. v. Northern P. Co., 216 U. S. 544	13
I. C. C. v. Alabama Midland R. Co., 168 U. S. 146, 174	13
Illinois C. R. Co. v. I. C. C., 206 U. S. 441	13, 18
Manufacturers' R. Co. v. U. S., 246 U. S. 457, 483	27
Mellon v. World Publishing Co., 20 F. (2d) 613, C. C. A. 10th Cir.; 16 F. (2d) 130 U. S. D. C. Okla	36
Midcontinent Case, Docket 15584	33
Minneapolis & St. L. R. Co. v. Minnesota ex rel Railroad & Warehouse Comm., 186 U. S. 257	9
Nagase & Co. v. D. G., 62 I. C. C. 422, 426	36
Porter Oil Co. v. A. T. & S. F. Ry. Co., 172 I. C. C. 407	32
Procter & Gamble Co. v. I. C. C., 225 U. S. 282, 292	26
Refined Petroleum Products In Southwest, 171 I. C. C. 381; 174 I. C. C. 745	32
Sioux City Chamber of Commerce v. B. & O. R. R. Co., 120 I. C. C. 7, at Page 14	35
Southern P. Co. v. I. C. C., 219 U. S. 433	13
South Dakota Case, Docket 16309	33
Wyoming Coal Co. v. V. Ry. Co., 98 I. C. C. 488, 497	36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 470

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NORTHWEST PETROLEUM ASSOCIATION, ET AL, *Appellants*,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

Appeal from the District Court of the United States for the District of Minnesota.

BRIEF FOR THE NORTHWEST PETROLEUM ASSOCIATION AND OTHER INTERVENERS AGAINST THE INJUNCTIVE RELIEF SOUGHT

STATEMENT

This brief is presented on behalf of the scores of small independent oil jobbers in western Minnesota and throughout North Dakota who as complainants before the Interstate Commerce Commission have been endeavoring since 1925 to secure a reasonable level of freight rates on their shipments of petroleum products from the Midcontinent field in Kansas, Oklahoma and Texas.

This is a suit under the provisions of the Urgent Deficiencies Act (38 Stat. 219) by only five railroads out of the scores of railroads that were defendants before the Commission, to enjoin and set aside the order of the Commission dated December 1, 1931, entered in the proceeding before it filed by these interveners designated as Docket No. 17304, *International Oil Company, et al v. Abilene & Southern Ry. Co., et al,* ordering reductions in the rates on petroleum products from the Midcontinent oil field to destinations in western Minnesota and North Dakota which were assailed in that proceeding as unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act (49 U. S. C. A. Section 1). Two reports have been made and published by the Commission in the proceeding cited. See: 139 I. C. C. 605; 179 I. C. C. 435, reproduced of record at pages 75 and 120 respectively of the printed Transcript.

The three judge Court provided for by the statute was convened at St. Paul, Minnesota, April 10, 1932 to pass upon the petitioners' application for an interlocutory injunction. At that time the interveners filing this brief presented their petitions to intervene in accordance with the provisions of Section 212 of the Judicial Code (28 U. S. C. A. Section 41, page 650) and by orders then entered by the Court, were made parties hereto. (253-255)*

At the conclusion of the hearing it was stipulated between counsel for the parties that the case would be submitted as on final hearing, counsel for petitioners having stated that no evidence would be introduced in their behalf on final hearing. The evidence of record upon which the Commission rendered its decision leading to the order in question was not introduced before the Court. (277)

*The figures in parentheses, unless otherwise indicated, refer to the pagination of the Transcript of Record.

The petition alleges three grounds upon which the injunction is sought, to wit:

1. That the rates prescribed by the order of December 1, 1931 as shown upon the face of the Commission's report, are without evidence of record to justify them as "intrinsically" reasonable as distinguished from "relatively" reasonable.

2. That in refusing to consolidate the case in question with cases involving rates from Wyoming as petitioned by these carriers, the Commission acted so arbitrarily as to deny petitioners a fair hearing on the question of the intrinsic unreasonableness or reasonableness of the rates under attack from the Midcontinent field.

3. That in view of the rule announced by this Court in *A. T. & S. F. Ry. Co. v. U. S.*, 284 U. S. 248, *(The Grain Case)* because of changed economic conditions (diminishing carrier revenues and earnings) which had taken place since the record before the Commission was closed on January 15, 1930 relied upon in their petition to rehear filed with the Commission, these petitioners were entitled as a matter of right to such rehearing and the denial thereof by the Commission was tantamount to a denial of a full hearing as provided in the Interstate Commerce Act and deprived them of their property unconstitutionally. (1-19)

The Court refused the injunction on grounds 1 and 2 but granted it on ground 3. The Court's opinion reported at 60 F. (2d) 302, will be found at pages 273-287 of the printed Transcript.

On August 5, 1932, the Court below made its findings of fact and conclusions of law and pursuant thereto entered its final decree perpetually enjoining the Commission's said order of December 1, 1931. (287-295) Thereupon by tariffs duly filed with the Commission, the reduced rates which became effective March 15, 1932 under the order of December 1, 1931, were cancelled and the higher basis theretofore in effect was restored effective September 23, 1932.

The interveners filing this brief, by order of the Court below of September 14, 1932, were permitted to adopt as their own the appeal papers filed herein by the United States and were made parties appellant to the appeal herein which was granted September 17, 1932 pursuant to petition therefor and assignments of error duly filed with the Court. (297-304)

POINTS RELIED ON UPON THIS APPEAL

I

The District Court erred in granting and issuing a permanent injunction, annulling, suspending, and enjoining enforcement and operations of the order of the Interstate Commerce Commission.

II

The District Court erred in finding and holding that the Commission abused its discretion in denying appellees' petition of February 3, 1932, for reopening and further hearing in the proceeding before the Commission. (304)

SYNOPSIS OF THE ARGUMENT

The Argument in support of the Points relied upon on this appeal, will be presented under the following headings:

I

The Commission, in denying the petition to rehear filed by the four Railroads, did not abuse the discretion vested in it to allow or deny rehearings because the new evidence which was thereby sought to be offered was immaterial.

II

The interpretation placed by the District Court upon the decision of this Court in *A. T. & S. F. Ry. Co. v. U. S.* 284 U. S. 248 and the application of the holding therein made by said Court in this case amounts to a preemption by the Courts of the field of rate making which under the Constitution is vested solely in Congress.

III

In the light of all of the circumstances by which its action was necessarily governed, it can not rightly be held in denying the petition to rehear in question, the Commission denied these Petitioners a full hearing on the alleged changed economic conditions (diminishing carrier revenues and earnings).

IV

The District Court was right in denying the Injunction on the other grounds stated in the Petition.

ARGUMENT

I

The Commission, in Denying the Petition to Rehear Filed by the Four Railroads, did not Abuse the Discretion Vested in it to Allow or Deny Rehearings Because the New Evidence which was thereby Sought to be Offered was Immaterial and Irrelevant.

The District Court permanently enjoined the Commission's order in question upon the theory that the denial by the Commission of the petition to rehear filed by the four railroads offering to prove upon such rehearing that the

gross and net revenue of the four petitioners and six other roads selected out of the scores of railroad defendants in the proceeding, had materially declined since January 15, 1930 when the record in this proceeding was closed, and that the refusal of the Commission thereby to entertain such evidence, amounted to a denial of such a full hearing as is provided for by Section 15, paragraph 1 of the Interstate Commerce Act (49 U. S. C. A., Section 15) and guaranteed by the 5th Amendment to the Constitution. (284-7)

Turning to the petition to rehear in question, it is clearly apparent that what the petitioners wanted was an opportunity to show the Commission upon further hearing that since January 15, 1930 when the record in the proceeding before the Commission was closed, their earnings on all traffic had undergone a material change for the worse and that the reduction in revenues that would result from the reduced rates prescribed by the order of December 1, 1931 would further impair their earnings. The only other thing that the petitioners wanted to show upon rehearing was that the rates from the Midcontinent field to South Dakota as well as the rates from the Midcontinent field to the territory immediately east of the destination territory involved, both of which sets of rates had been fixed by the Commission itself in other proceedings, were unreasonably low and should be increased. (146-150)

Scrutinizing the second of these two propositions first, it is at once obvious that evidence to prove that rates between points not in issue in the particular proceeding, looking to the increasing of such rates, is immaterial and irrelevant. The proceeding in which the petition to rehear was filed, brought in issue the level of rates solely from the Midcontinent field to North Dakota and western Minnesota. In such a proceeding, the petitioners upon rehearing want to offer evidence that the rates to other points not involved in

the particular case, are too low. That such evidence is immaterial and irrelevant in the particular proceeding is too elementary to warrant further comment.

If these petitioners have new evidence of a compelling nature that will demonstrate that the rates from the Mid-continent field to South Dakota or to the territory immediately east of the destination territory in this case recently fixed by the Commission, are unreasonably low and should be increased, the proper proceedings and the only proceedings in which such evidence is material and relevant and the only proceedings in which the Commission pursuant to such evidence can increase those rates, are the cases in which those rates were in issue and in which the rates which these petitioners now question, were fixed, towit; Dockets 16309 and 15584, respectively. (75, 19)

Certainly the Commission will not be held to have abused the discretion vested in it by Section 16a of the Interstate Commerce Act (49 U. S. C. A. Sect. 16a) to grant or deny petitions to rehear in proceedings before it, in refusing to entertain in the proceeding in question evidence designed and intended to bring about an increase in rates to points not in issue, particularly where the rates to these other points were in issue in other proceedings in which such rates had been recently fixed by the Commission.

Coming now to the first proposition raised by the petition to rehear as above stated, it happens that in at least two decisions of this Court it has been held that evidence as to carrier earnings from all traffic or the deficiency thereof, is immaterial and irrelevant in a proceeding like the one in question before the Commission where the rates on a single classification commodity such as petroleum products, are alone in issue.

It must be apparent upon the most superficial consideration aside from any supporting authority, that whether a combination of railroads involved or any one of them, is

paying dividends or is not earning enough to pay dividends can be no criterion for judging whether the rates on a single classification commodity such as petroleum products, are too high or too low where the railroads involved haul all classes of freight in the usual proportions. The deficiency in earnings, if that condition is present, may be due to the fact that the rates on the numerous other classes of freight are too low, or to any number of other factors that may contribute to the situation.

These very considerations were given succinct expression by this Court speaking through Mr. Justice Lamar in *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, where at page 549, he said:

> "Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article." (222 U. S. 549)

Judicial statement could hardly be framed that would more aptly conclude this controlling point in the instant case. In the light of that statement of the rule of evidence on the precise point involved, it cannot be gainsaid that this new evidence as to earnings or lack of earnings referred to as changed economic conditions, was immaterial and irrelevant in the particular proceeding which involved the rates on a single classification commodity as distinguished from the whole body of rates on all classes and commodities.

See also *Minneapolis and St. L. R. Co. v. Minnesota ex rel Railroad and Warehouse Comm.* 186 U. S. 257, where in judging the propriety of certain rates on coal fixed by the Minnesota Railroad and Warehouse Commission as reasonable per se for intrastate application, this Court held that the return on the whole schedule so fixed, affords no light on the reasonableness of a particular rate.

Upon the authorities cited as well as upon the inherent soundness of the proposition itself, it is respectfully submitted that the new evidence referred to in the petition to rehear as showing changed economic conditions which in reality is nothing more or less than a showing of reduced carrier revenues and earnings, is and was immaterial and irrelevant to the particular proceeding before the Commission.

It might be noted that here again the petitioners were exerting their efforts in the wrong proceeding. On December 5, 1931 the Commission rendered its decision upon further hearing of oral argument in *Fifteen Per Cent Case, 1931, Ex parte No. 103,* 179 I. C. C. 215, a proceeding in which the whole fabric of freight rates was involved pursuant to petitions by the railroads of the country generally including these petitioners, to grant general increases in all rates sufficient to meet the revenue exigencies of the carriers precipitated by the depression. In that proceeding the Commission, among other increases, authorized an increase of one per cent per 100 pounds in all rates on petroleum products including the identical rates here in issue. (204, 228) If the rates fixed by the Commission in that proceeding involving the whole fabric of rates did not yield the desired revenue to meet the requirements of these petitioners, then, it is respectfully submitted, their showing of new evidence of deficiency in earnings should properly have been made in the general proceeding cited where clearly it would be material and relevant because in that

proceeding all of their rates are involved and the revenue producing qualities of the general rate level is the particular issue.

It cannot be said that the rule of evidence stated in the cases just above cited has in any wise been changed or qualified by Section 15 (a) enacted into the Interstate Commerce Act since those cases were decided, directing the Commission to initiate rates, if necessary, to yield the carriers a proper return, since Congress even in that amendment was careful by proviso to preserve to the individual shipper his right under Section 1 of the Act to a reasonable per se rate on a particular commodity. Section 15 (a), paragraph 2, after providing that the Commission shall adjust the rates of the carriers so that in the aggregate they will earn a fair return, provides:

> "*Provided*, that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

That Section 15 (a) was not intended to repeal or supercede Section 1 and the other rate fixing sections of the Act, is further evidenced by the following provision from Section 15 (a), paragraph 17:

> "the provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharge, unlawfully excessive or discriminatory rates, or rates excessive in their relations to other rates, * * *."

It must have occurred to this Court in the course of this argument so far that if this evidence as to alleged change in economic conditions which as stated before comes

necessarily to nothing more or less than a showing of declining carrier revenues and earnings, was and is immaterial and irrelevant in this oil case, such evidence must likewise have been immaterial and irrelevant in *A. T. & S. F. Ry. Co. v. U. S.*, 284, U. S. 248, where this Court reversed the District Court and directed that an injunction be entered against the Commission's order in the *Grain Case* on the sole ground that in a proceeding before the Commission involving the rates on this single classification commodity, viz: grain, the Commission abused the discretion vested in it with respect to granting or denying rehearing when it denied the petition to rehear filed in that case which sought to introduce into that case evidence of diminishing carrier earnings that had occurred since the record therein was closed.

Clearly the decision of this Court in that case was erroneous in principle and in conflict with its decisions in the two cases herein cited. But it is equally clear that in that case neither the Government nor the Commission nor any of the interveners in opposition to the injunctive relief sought, raised this point or cited the cases here relied upon, on this controlling question of evidence. Since the decision of this Court in *A. T. & S. F. Ry. Co. v. U. S.*, supra, in no wise overrules or qualifies or even mentions the rule of evidence above quoted from *Interstate Commerce Commission v. Union Pacific R. Co.*, this latter case must be the controlling authority on the point.

It is respectfully submitted, therefore, that the Commission can not have abused its authority vested in it with respect to rehearings by denying the petition to rehear here in question, if the new evidence relied upon in support thereof was immaterial and irrelevant as it has been herein clearly shown to be.

II

The Interpretation Placed by the District Court Upon the Decision of this Court in A. T. & S. F. Ry. Co. v. U. S. 284 U. S. 248 and the Application of the Holding therein Made by said Court in this Case Amounts to a Preemption by the Courts of the Field of Rate Making which under the Constitution is Vested Solely in Congress.

That the power to prescribe rates for the future for transportation by common carriers is a legislative power which under the Constitution is vested solely in Congress and that the Interstate Commerce Commission in fixing rates for the future pursuant to the Interstate Commerce Act is acting simply as a legislative agency of Congress, are fundamentals so firmly established that they require no further exposition here.

The field of judicial review of orders of the Commission fixing rates for the future is equally well defined in the decisions of this Court. See for example *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 541, a case strikingly like the case at bar in many aspects, where this Court speaking through Mr. Justice Lamar, at page 547, said:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in vio-

lation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 470; *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission v. Northern P. Co.* 216 U. S. 544; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 146, 174.

In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the Courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." (222 U. S. 547-8)

When the decision of this Court in *A. T. & S. F. Ry. Co. v. U. S.*, supra, the *Grain Case*, is studied in connection with the decision in *I. C. C. v. Union P. R. Co.*, supra, it is impossible to determine under which of the six categories of reviewability, the order in the *Grain Case* was enjoined. And particularly is this so in the light of the discussion just had under the preceding section of this brief.

Certainly there is nothing in the Constitution that guarantees to a railroad or a set of railroads subject to regulation by Congress, the right to have the Commission reopen its proceeding and set aside its order fixing rates for the future on a single classification commodity where it is not even contended that said order is not supported by evidence of record before the Commission, except upon a showing that the resulting rates are confiscatory. There was no allegation of confiscation in the *Grain Case* and there is certainly none in this case.

If the carriers involved in such a proceeding relating to a single classification commodity are confronted with a situation of diminishing carrier earnings approaching the vanishing point which is aggravated by further reductions in rates on a single commodity ordered by the Commission, the proper procedure is to present such situation to the Commission in a proceeding that will bring in issue the whole fabric of rates from the operation of which as a whole the deficiency in total revenues has resulted. In no other way can the burden of transportation entailed by the necessities of the situation be distributed over the entire shipping public upon whom such burden should properly fall and the shippers of the particular commodity be accorded the intrinsically reasonable rates to which they are entitled under Section 1 as well as Section 15 (a) of the Act.

The *Grain Case* is not before this Court for reargument or reconsideration and the propriety or impropriety of the decision in that case is not now in issue save as that decision may be considered by this Court as properly determinative of the issues in the instant case. It is apparent from the face of the opinion of this Court in the *Grain Case* that it was moved to the unanimous action therein taken by the magnitude of the reduction of carrier revenues entailed by the order in question in the face of alleged dimin-

ishing carrier earnings which to the uninformed by long past experience, seemed alarming. We say uninformed respectfully and advisedly upon no less authority than that of this Court itself. See *I. C. C. v. Union P. R. Co.*, supra, page 547-8. We pause here to remark parenthetically that unless the grain rates from the producing territory to the primary markets which is the movement that in large measure was involved in the *Grain Case*, are sharply reduced, much of this traffic will eventually be diverted to truck transportation just as has happened in the case of livestock with even greater loss of revenue to the rail carriers which can never be recaptured. It must be remembered that a reduction in rates does not necessarily entail an ultimate reduction in revenue.

In the *Grain Case* this Court was confronted with an unusual situation. In the first place that was a Hoch-Smith Case, a proceeding instituted by the Commission upon its own motion in response to the provisions of the Hoch-Smith resolution (49 U. S. C. Section 55). The powers conferred upon the Commission by that Resolution were interpreted by it somewhat differently from the interpretation later placed thereon by this Court in *Ann Harbor R. Co. v. U. S.* 281 U. S. 658. The case affected a "vast territorial domain," countless railroads, scores of major issues incident to the transportation of grain, but most of all it presented a most arresting recital of diminishing carrier revenues referred to as changed economic conditions. The amounts arrayed ran into nine figures. The estimated reductions as a result of the Commission's order in question, would add another twenty million to the discouraging totals. The very magnitude of the alleged reductions occasioned by the order was manifestly the impelling reason which prompted the action of this Court in that case. All of these circumstances admittedly are exceptional.

The District Court, however, has drawn from the decision rendered under these exceptional circumstances, a rule of law to be applied "to a single carrier with a few miles of track, operating in a limited territory," that Court says:

> "The facts in this case and in that case *(Grain Case)* are different. The proceeding here in question was not initiated by the commission itself. The number of carriers involved in this case is not nearly so great; the territory affected is not nearly so large; the amount of carrier revenue affected by the reduced rates in this proceeding is comparatively small. The defendants and interveners feel that these things distinguish that case from this one. They believe that the Supreme Court was dealing with a specific case, and that the rule laid down by it can not be said to be properly applicable to a situation where the questions involved are not so important and the consequences so grave. It is logically impossible to see why the number of carriers, the extent of territory, the amount of carrier revenue affected, can furnish the solution to the question as to whether a hearing by the commission upon which an order reducing rates was based is fair or unfair, or whether its action in denying the petition for a rehearing was arbitrary or otherwise. A single carrier with a few miles of road, operating in a limited territory, is as much entitled to a fair hearing and fair treatment at the hands of the commission as a large group of carriers operating in any vast territory, and the law will certainly afford it the same protection. It has the same rights as the powerful group and may be very much more in need of them." (285)

In the *Grain Case* the record was closed September 22, 1928 and the order enjoined was dated July 1, 1930, the petition for rehearing was filed February 18, 1931. In the case at bar the record was closed January 15, 1930, the order sought to be enjoined is dated December 1, 1931 and the petition to rehear was filed February 3, 1932. When

this case was first heard the record was closed October 26, 1925 and the order made pursuant to that record was dated March 5, 1928. The lapse of time between the closing of the record of evidence and the Commission's decision as illustrated by the comparative dates just given, is not unusual in proceedings before the Commission. Although the shipping public is universally fretful over such lapses of time and delay in decision, there is none who will say that the Commission is not outstanding for its industry and diligence under all of the circumstances. This is not the occasion for any defense of the Commission on this score. If the situation can be remedied, the remedy rests alone with Congress. The facts, however, establish the proposition that of necessity under the exigencies of the situation, a considerable lapse of time between the closing of the record and the decision of the case is encountered in varying degree in every case.

Confronted with this situation as an established fact, if petitions to rehear must be granted "one carrier operating a few miles of track in a limited territory", the rule must operate equally in favor of the opposing party where the conditions are reversed, with the result that in every case, the parties are entitled, as a matter of right, to have cases reopened to bring the records down to date. Just how stale the record must be before the party will be entitled as a matter of right to have same reopened, injects another factor that further multiplies and complicates the Commission's functioning if any such application of the decision in the *Grain Case* as made by the District Court in this case, is sustained.

If logically carried through it is conceivable that a case before the Commission might never be decided if conditions can be alleged to be changing. The Commission would be so engaged in examining successive petitions to rehear that cases could be so practiced before the Commission that a

decision could never be reached, under the application made by the District Court in this case of the decision in the *Grain Case.*

If the decision in the *Grain Case* is right in principle, then that principle should apply indiscriminately regardless of the amount involved or anything else. Such an application of the *Grain Case* manifestly must inevitably lead to such an interruption of the processes of legislative rate making by the Commission as to constitute a preempting of that field by the judiciary under the guise of ruling that denial of petitions to rehear constitutes arbitrary action.

Manifestly the *Grain Case* was an exceptional case and must be so applied otherwise the application of that decision uniformly as logically must follow as pointed out by the District Court, if it is to be considered as binding in any other case, must necessarily lead to a complete prostration of rate fixing by the Commission.

III

In the Light of all of the Circumstances by which its Action was Necessarily Governed, it can not Rightly be held that in Denying the Petition to Rehear in Question, the Commission Denied these Petitioners a Full Hearing on the Alleged Changed Economic Conditions (Diminishing Carrier Revenues and Earnings).

It is conceded in the decisions of this Court that the Commission in passing judgment upon the matters presented to it and in making its findings, must act upon the record as made but in the light of the "information which it has acquired by experience." See *Illinois C. R. Co. v. I. C. C.* 206 U. S. 441, for example.

By experience the Commission has learned that in the end every inquiry concerning the level of freight rates

necessarily resolves itself to a greater or less degree, into a glorified guess as to what the traffic will bear or how much the shipping public can pay.

In the *Grain Case* this Court held that it was entitled to take judicial notice of the depression. If this Court must take judicial notice of the depression, then certainly there is an equal duty upon the Commission to take judicial notice of the depression in making its judgments or findings. If there is this duty upon the Commission, then it must be assumed in the absence of allegation and proof to the contrary that its judgments are cast in the mould so ordained

Now the only difference between the judicial notice which this Court gave to the depression in the *Grain Case* and the judicial notice which the Commission gave to the depression in passing upon the petition to rehear in this case lies in the fact that in the *Grain Case* this Court looked at the depression only as it immediately affected the railroads. This Court never once stopped to consider how the depression was affecting the shipping public and its ability or willingness to pay freight rates in the face of other forms of unregulated transportation at lower costs. When the Commission passed upon the petition to rehear in this case in taking judicial notice of the depression it had to look at both sides of the picture. It could not look only at the fact of diminishing carrier revenues but it had to look at the diminishing ability of the consuming public to support even the level of freight rates fixed by its order.

And this brings us to another important difference between the case at bar and the situation in the *Grain Case* and that is that in this case the Commission in another proceeding before it, viz: *Ex parte 103*, had simultaneously considered all the "facts" of the depression as distinguished from judicial notice of the situation. The Commission decided this oil case on December 1, 1931. On December 5, 1931 it made its final decision in *Ex parte 103*. The Com-

mission in passing upon the petition to rehear in this case did not have to rely upon judicial notice of the depression because it had all of the "facts" in *Ex parte 103*. This constituted its "informed experience" which under the law it is supposed to bring to the judgments it renders.

The petition instituting *Ex parte 103* was not filed until several months after the Commission had denied the petition to rehear in the *Grain Case*. The petition initiating *Ex parte 103* was filed June 17, 1931 whereas the petition to rehear in the *Grain Case* was filed with the Commission February 18, 1931 and was denied March 3, 1931. (178 I. C. C. 555; 284 U. S. 256-7). When the Commission denied the petition in the *Grain Case*, it had not examined in *Ex parte 103* all of the facts of the depression as they affected the railroads as well as the shipping public. In the case at bar, the denial of the petition to rehear was a judgment rendered out of an "informed experience" growing out of *Ex parte 103*.

Ex parte 103 was the kind of a proceeding that has been referred to heretofore as the sort of a proceeding in which the railroads might properly present to the Commission evidence of diminishing carrier revenues and earnings looking to rate changes to meet the situation. That proceeding involved the whole fabric of rates on every line of railroad and was instituted by the carriers in order to present to the Commission the facts as to changed economic conditions brought about by the depression and to secure an increase in rates that would produce additional revenue and earnings. The petitioners in the case at bar were parties to *Ex parte 103*.

Evidence was offered in *Ex parte 103* by both carriers and shippers. The Commission was informed by the evidence in that proceeding as to how the depression was affecting the shipping public as well as the carriers. The very oil rates that were in issue before the Commission in

the case at bar were also in issue before the Commission in *Ex parte 103*. Upon all the evidence and considering the needs of the carriers on the one hand and the likelihood of obtaining increased revenues through increased rates on the other hand, the Commission authorized an increase in the very rates here in issue of one cent per 100 pounds uniformly. Other increases were granted in other rates, all designed to meet the situation presented. See 179 I. C. C. 215, (204-230).

Undoubtedly what has just been indicated will serve to clarify and emphasize the contentions advanced under Section I of this Argument. If the emergency increases allowed in *Ex parte 103* are not sufficient in actual practice to meet the necessities of the five railroads petitioning in the instant case, then clearly their petition to rehear should be filed in *Ex parte 103* and not in this case which involves only a small part of their oil traffic which in turn is a small part of their total traffic. In *Ex parte 103*, upon further hearing, if the showing warrants and it is satisfied that further increases of these oil rates will yield additional revenues all rail from the Midcontinent field, the Commission will undoubtedly further increase all oil rates, including those involved in the instant case, as well as all of the other rates of these petitioners as may be required to meet the situation.

But the propriety of the Commission's denial of the petition must also be judged in the light of the other circumstances and conditions present in this situation.

These small independent oil jobbers who are the complainants before the Commission in this case, have to meet the competition of the large integrated oil companies such as the Standard Oil Company (Indiana) and the Texas Company and the Standard Oil Company (New York) through its ownership of the White Eagle Company, which own and operate bulk plants and filling stations in the des-

tination territory as well as owning and operating through affiliated corporations their own refineries and pipe lines. These integrated companies have large refineries in Wyoming and Montana which refine the crude oil which these companies control in those states. These large integrated companies are not equally entrenched in the Midcontinent field where the production is in great measure by a large number of so-called independent refineries.

The small independent jobbers can not secure their supplies of gasoline and oils from the large integrated companies except they contract to handle the products of one such company exclusively. These small independent jobbers are forced, therefore, to obtain their supplies from the independent refineries in the Midcontinent field, in large measure, if not entirely. These independent refineries on the other hand can not sell their product through the jobbing companies of the large integrated companies, with the result that these independent refineries are dependent in large measure upon the small independent jobbers for the outlet for their product. The combination of the independent refiner in the Midcontinent field and the independent jobber at destination supplies a part of the competition which the large integrated companies have to meet in marketing their product. There is, of course, a certain competition between the large integrated companies themselves. Over sixty per cent of the petroleum products consumed in the destination territory here involved is sold by the large integrated companies, supplied largely from their Wyoming refineries. (112-114)

In addition to this factor of strong commercial competition between competing producing fields through competing outlets in a common market territory, there is a carrier situation here present that arises from the fact that the delivering lines have a different and a conflicting interest from that of the rail lines that originate this traffic in the Midcontinent field. The traffic in the

Wyoming field is originated by the Chicago and Northwestern or the Chicago, Burlington & Quincy. Each of these carriers in turn forms a part of available routes from the Midcontinent field to this market territory. The Burlington is jointly owned by the Great Northern and Northern Pacific. (See *Great Northern Pac. Ry. Co. Acquisition,* 162 I. C. C. 37, 71). The Great Northern and Northern Pacific in turn are the chief delivering lines measured by the extent of lines in the territory, followed by the Soo Line, the Milwaukee and finally the Northwestern with a negligible mileage in the destination territory. In the very nature of things, these destination carriers are the same whether the traffic originates in Wyoming or in the Midcontinent fields. It is apparent, however, that if the traffic originates in the Wyoming field it must move out by either the Northwestern or Burlington each of which will probably handle the traffic direct until it is turned over to the delivering line where either is unable to perform the entire transportation. On the other hand, there are scores of carriers under the routings available on traffic moving from the Midcontinent field, that can participate in such traffic before it is turned over to the destination lines for delivery. Among these scores of possible intermediate carriers the Northwestern, Burlington and Milwaukee are included even though they may not be the delivering line. (See carriers listed as parties defendant to order in Docket 17304, Transcript pages 104-10)

The short line route from the Midcontinent field to western North Dakota figures via Kansas City and Aberdeen, South Dakota, whereas the short line route to eastern North Dakota and western Minnesota figures through Kansas City, Sioux City and Willmar, Minnesota. The larger part of the traffic, however, moves via St. Paul, Minnesota where it is delivered to the destination lines, all of which operate from St. Paul into the destination territory. (113, 123, 126)

Either because of the continuity of interest between the Burlington and the chief destination lines, to wit; Great Northern and Northern Pacific and because of the basis of divisions with the Northwestern which these destination lines are able to negotiate on traffic from Wyoming in view of their ownership of the Burlington, or because of the powerful influence of the large integrated companies through their control of a vast tonnage, the combination of carriers operating from Wyoming to this destination territory find that traffic more to their liking than the petroleum traffic moving from the Midcontinent field. Indeed these considerations were strong enough to lead these carriers to propose and fight strenuously to justify, reduced rates from Wyoming to this territory that would have entailed reductions in revenue far greater than that involved in the Commission's order that has been enjoined in this case. (112-115)

In addition to this factor of strong competition of the combination of rail carriers serving this destination territory from the Wyoming field versus the other many combinations of rail carriers that can supply the petroleum demands of this destination territory from the Midcontinent fields, there is a further factor of carrier competition and that is the competition of pipe lines and the rate policies under which they are operated.

A gasoline pipe line is owned and operated from the Midcontinent field to Minneapolis by certain of the larger oil companies with refineries in that field. The pipe line rates to Minneapolis in connection with the local rail rates from Minneapolis to the destination territory are designed to equalize with the joint through all rail rates from Tulsa (Group 3) to the market territory. The oil companies owning this pipe line maintain their own outlets in the market territory which they supply from the Midcontinent field via their pipe line to Minneapolis in connection with

the local haul of the delivering rail lines before named from Minneapolis to the destination territory. This pipe line is a common carrier and transports gasoline of other interests that offers itself. These delivering lines want this traffic from the Midcontinent field to move to Minneapolis via pipe line because on this traffic they get their full local instead of a division of a joint through rate which may be less. In either instance, however, the revenue resulting is dependent, under the rate policy observed by the pipe line, upon the level of the joint through all rail rate. If the all rail rate is reduced such reduction must be met by a reduction of the pipe line rate to Minneapolis or by a reduction in the local rail rates of the delivering lines from Minneapolis or by lesser reductions in both. (149; 245)

There is one further situation that needs to be mentioned to complete the background of the picture of this case and that is the fact that the price of petroleum products at Tulsa is a price barometer in the oil trade just as the Pittsburg price is the price barometer in the steel industry. The freight rate from Tulsa to a particular destination assumes, therefore, a vital price significance even though not a car of petroleum ever moves, because the freight rate plus the Tulsa price represents the published competition that must always be met in supplying a particular market.

From this recital of trade conditions in the oil industry and competitive conditions actuating the carriers, the Court must undoubtedly have sensed the contending forces that were set in motion when these small independent jobbers in the destination territory, somewhat naively, filed a complaint with the Commission looking solely to a reduction of the rail rates they were paying on their shipments from the Midcontinent field and the recovery of the unlawful excess paid on past shipments. This recital is enough to explain, without further particularization, why the delivering lines joined with the lines operating from Wyom-

ing in publishing reduced rates from Wyoming which for the Northwestern alone involved an annual reduction in revenue of $370,000.00 but which were suspended by the Commission; why following the cancellation of these proposed reductions by order of the Commission in I. & S. 3148, the Standard Oil Company (Indiana) filed a formal complaint against the Wyoming rates; and, why these delivering lines then made such a determined effort to get the complaint of these independent jobbers against the unreasonableness of the rates from the Midcontinent field, consolidated for hearing with the Standard Oil complaint so that this Section 1 complaint against the level of rates from the Midcontinent field could be turned into an undue prejudice consideration rather than a consideration of intrinsic unreasonableness solely; and, why, finally, this suit is brought to enjoin the rates from the Midcontinent field by only five out of the many scores of railroads really involved, these five being the lines that seem to be actuated by some subtle influence that makes them pro-Wyoming and contra-Midcontinent field all rail.

The complaint of these small independent jobbers in western Minnesota and throughout North Dakota was filed with the Commission July 15, 1925 and was docketed as No. 17304. (4) The case was heard by an Examiner of the Commission at Fargo, North Dakota, October 23-26, 1925. (5) The case was decided by the Commission March 5, 1928, a little over two years and four months after the record was closed. (6) On a record that was closed October 26, 1925, the Commission decided on March 5, 1928 that effective June 14, 1928, the rates attacked July 15, 1925 would be unreasonable for the future by prescribed amounts but that such rates that had been paid during the period indicated, had not been unreasonable by any amount. This negative finding on past unreasonableness, under this Court's decision in *Procter & Gamble Co. v. I. C. C.*, 225

U. S. 282, 292, and *Manufacturer's R. Co. v. U. S.*, 246 U. S. 457, 483, foreclosed these complaints from a review in the Courts of this clearly erroneous decision as to past unreasonableness and reparation.

The facts are that during the period indicated of over two years, these shippers paid rates that were unreasonable as established by the record before the Commission. The measure of the unreasonableness involved, is indicated by the following comparison of the rates attacked and the rates found reasonable by the Commission effective June 14, 1928 taken from Appendix C of the Commission's decision. (87)

FROM GROUP 3 TO	Rate Assailed.	Rate Prescribed Effective June 14, 1928	Rate Prescribed Effective March 15, 1932. (X)	
Morris, Minnesota	58	54	50	
Fergus Falls, Minnesota	64	61	55	
Wheaton, Minnesota	56.5	—	55	(Collis-Wahpeton)
Wadena, Minnesota	62.5	62.5	55	
Bermidji, Minnesota	70.5	67	60	
Grand Rapids, Minnesota	64	70*	60	(Warba-Bermidji)
Wahpeton, North Dakota	65	60	55	
Fargo, North Dakota	70	62	57	
Grand Forks, North Dakota	75.5	70	63	
Davids Lake, North Dakota	83.5	74	70	
New England, North Dakota	102.5	80	78	
Wallhalla, North Dakota	86	80	72	
Jamestown, North Dakota	81	76	63	
Rugby, North Dakota	89.5	77	73	(York-Towner)
Minot, North Dakota	92	81	75	
Bismarck, North Dakota	94.5	82	70	
Antler, North Dakota	99	88	80	
Williston, North Dakota	111	88	85	(Epping-Fort Bufford)
Dickinson, North Dakota	107	88	78	

* Because of a Fourth Section violation the carriers could not put in the 70 cent rate prescribed but had to publish a rate of 67 cents instead.

(X) The rates prescribed by the Commission upon rehearing which will be referred to hereinafter, are also set forth in this table. These rates were taken from Appendix B, to the Commission's decision herein dated March 30, 1929 (111, 132-144).

In connection with the rates prescribed effective June 14, 1928, the Commission pointed out that such rates were intended as representative and directed the defendants to establish rates to the other destinations involved in proper relationship thereto, having due regard for difference in distance. (186) The defendants, however, did not carry out this injunction. The rates published to points in southern North Dakota were so high as compared with the rates prescribed to points in northern South Dakota like Aberdeen, that the jobbers at those points were confronted with a new condition, namely, competition from tank trucks sent out from competing points enjoying these lower rates. For example, the rate to Rutland, North Dakota was published as 63 cents and to Ellendale 71 cents, to Oaks, North Dakota a rate of 73 cents and to Edgeley, North Dakota a rate of 73.5 was published, as compared with a rate of 55 cents prescribed to Aberdeen. The Aberdeen distance is 875 miles as compared with 913 miles to Ellendale, 929 miles to Oaks, 939 miles to Edgeley, while Rutland is only 64.4 miles from Aberdeen via the Great Northern. (See appendices to reports 131, 133, 139, 144)

From the Minnesota entrance to the destination territory a similar rate inconsistency was encountered from the Mid-continent field under the rates published by the defendants in supposed compliance with the Commission's decision, so that the rates to 106 out of 836 destinations involved, were, as a matter of fact, increased. (124)

Upon analysis it was also apparent that the level of rates prescribed by the Commission to North Dakota and western Minnesota was on a higher basis than the level fixed in the same decision to South Dakota. For example, using first class rates under the Southwestern Scale as the common yardstick, the rates prescribed to points in the eastern part of South Dakota, such as Yankton, Mitchell, Huron, Chamberlain and Watertown varied from 20 to 22.5 per

cent of the corresponding first class rate under the scale. (131, Appendix A) Whereas the rate fixed to Fargo, North Dakota on the eastern boundary of North Dakota was 24.5 per cent, the rate prescribed to Wahpeton, North Dakota was 24.5 per cent, the rate prescribed to Bermidji, Minnesota, was 26 per cent, of the corresponding first class rates under the scale. (Column C of Appendix B, 132-144). Turning to the western part of South Dakota as compared with the western part of North Dakota a corresponding disparity is disclosed. To Rapid City, South Dakota the rate prescribed by the Commission is 26 per cent, to Isabel 27 per cent, to Dead Wood 26.5 per cent, to Lemmon 26.5 per cent, to Belle Fousche 27 per cent and to Faith 28 per cent of the corresponding first class rates under the scale. (131, Appendix A) To Bismarck, North Dakota the rate prescribed by the Commission was 31 per cent, to Jamestown, North Dakota 30 per cent, to Oaks 29.5 per cent, to Dickinson 32 per cent, to New England 29.5 per cent (mistakenly shown in the record at page 144 as 20.5 per cent), to Antler 31.5 per cent, to Minot 29.5 per cent of the corresponding first class rates under the scale. (Appendix B, 132-144) The decision of the Commission indicated no evidence of record which would justify a higher level of rates to the destination territory in western Minnesota and North Dakota than that prescribed for South Dakota. (75-87)

A petition to rehear was filed with the Commission May 21, 1928 by these independent oil jobbers setting forth the matters just above recited. That petition was denied February 11, 1929. A second petition filed April 19, 1929 was granted June 10, 1929 and the Commission reopened this case for further hearing. (237) Further hearing was had at Fargo, North Dakota January 14-15, 1930. (11) Upon the record as supplemented by the additional evidence presented by both complainants and defendants upon this further hearing, the Examiner proposed rates substantially

below the rates fixed by the Commission effective June 14, 1928 which he found had been unlawfully excessive since that date to the extent they exceeded the rates he proposed and awarded reparation to that basis. (See Appendix B, Column E, 132-144) Pursuant to exceptions to the Examiner's report and briefs in support thereof, the Commission under date of December 1, 1931, rendered its second decision in this case in which it prescribed in lieu of the rates which it had previously fixed herein effective June 14, 1928, a lower level of rates but not as low as that proposed by the Examiner and instead of awarding reparation as was proposed by the Examiner, the Commission denied reparation except in certain instances in which the Commission was of the view that the carriers had not established rates as required by its former order. Here again the Commission upon a record that was closed January 15, 1930 decided on December 1, 1931 that rates were shown by that record to be unreasonable effective March 15, 1932 but refused to hold that in the interim the rates paid by the complainants had been equally unreasonable and denied reparation. As stated before, with reference to the Commission's findings as to reparation and past unreasonableness in connection with the former decision, under the decisions of this Court because the order as to reparation is negative, the shippers are without remedy to secure correction in the Courts of the manifest error of law.

The rates prescribed for the future by the Commission in its second decision have been set forth in the above table. If the percentage relationship of these rates to first class rates under the Southwestern scale as shown in column G of Appendix B, (132-144) is compared with the similar percentages under the South Dakota rates shown in Appendix A (131) it will be noted that even these rates are still on a higher level than the South Dakota rates, particularly those to western North Dakota destinations. As has been

before noted, to the more western points in South Dakota the rates prescribed by the Commission reflect percentages of the first class rates under the Southwestern scale ranging from 26 to 28 per cent whereas the rate prescribed to Minot effective March 15, 1932 is 27.5 per cent and the rates prescribed to more western North Dakota points reflect percentages as high as 29 per cent in many instances. In this connection it might be noted that in a recent case to points in western Nebraska and eastern Colorado from the Midcontinent field, the Commission prescribed rates on petroleum products 25 per cent of the first class rates under the Southwestern scale. See *Porter Oil Co. v. A. T. & S. F. Ry. Co.*, 172 I. C. C. 407. And that throughout Southwestern territory which includes Oklahoma and Texas, the Commission has prescribed petroleum rates for local application that are on a basis that is even less than 25 per cent. See *Refined Petroleum Products in Southwest*, 171 I. C. C. 381; 174 I. C. C. 745.

On February 3, 1932 only the Northern Pacific, Great Northern, Soo Line and Milwaukee out of the scores of defendants to the complaint before the Commission, filed a petition for rehearing with the Commission. This petition recites, it is true, that it is filed on behalf of petitioners "and in behalf of all other defendants herein." (146) But the authority of these petitioners to act upon behalf of any others than themselves in filing that petition, does not appear of record. It is to be noted that the Northwestern, which is a petitioner in the case on trial, was not a petitioner in the petition to rehear filed with the Commission. It is also to be again noted that none of the scores of rail lines who were defendants before the Commission, are petitioners in the case on trial except the four delivering lines and the Northwestern, a group that seems particularly interested in moving petroleum products from Wyoming

or from the Midcontinent field by pipe line to Minneapolis from which point they get the delivering haul at their full local rates. (245)

This petition to rehear filed with the Commission by the four lines mentioned, recites that the yardsticks of reasonableness used by the Commission upon rehearing in reaching its conclusion as to the intrinsic unreasonableness of the rates originally fixed in this case, towit; the level of rates prescribed by it to South Dakota and the level of rates prescribed by it up to the eastern gateways to the destination territory involved, were bases of rates fixed by the Commission upon records that were closed in 1925 and that traffic and transportation conditions pursuant to which those yardsticks of reasonableness were established, have changed and are wholly different now and that if given an opportunity to do so, the petitions aver that they could prove that these rate levels fixed by the Commission in the *South Dakota Case*, Docket 16309, (75), and in the *Midcontinent Case*, Docket 15584 (19) were unduly and unreasonably low in the light of existing circumstances and conditions and can and should be substantially increased. The petitioners fail to set out any comparative data on traffic and transportation conditions to support their statement that since 1925 there has been such a change in these conditions as to render the rates fixed in those cases unduly and unreasonably low in the light of existing conditions. But whatever the fact may be in this particular, the important thing to be noted is that the petitioners although they were parties to the proceedings mentioned, do not ask in their petition that those cases be reopened and that the rates therein prescribed be increased. (149-150, 246)

It is significant that the petition to rehear does not allege that the rates fixed by the Commission upon further hearing to North Dakota and western Minnesota are too low

as compared with the rates fixed by the Commission to South Dakota and the rates also fixed by the Commission up to the eastern boundary of the destination territory here involved. On the contrary the petitioners recognize that the rates to the destination territory here involved can not properly exceed relatively the rates prescribed to South Dakota on the one boundary and to the eastern adjacent territory on the other boundary. (149-150, 246)

In considering the petition to rehear, the Commission had to take these many elements of trade conditions as well as carrier differences into account as well as the question of diminishing carrier revenues and ability of shipping public to pay. The Commission had to look at the rates themselves which it had prescribed and the Commission had to recognize that the petition only sought a rehearing of the particular situation which would leave relatively lower rates in effect to South Dakota and the eastern adjacent territory than to North Dakota and western Minnesota, for a further period during rehearing. The Commission had to consider the effect of the situation upon the rail carriers that originate this tonnage in the Midcontinent field, also defendants, which, however, were not petitioning.

Is this Court in the light of all of these controlling circumstances that the Commission was bound to consider, prepared to say that the Commission acted so arbitrarily in denying the petition to rehear in question, that its action was tantamount to denying the "full hearing" provided by law?

It is respectfully submitted that the District Court erred in permanently enjoining the Commission's order of December 1, 1931 on the ground that the Commission, by denying the petition to rehear, denied the "full hearing" provided by law, and that its decree should, accordingly, be reversed and the injunction vacated.

IV

The District Court was Right in Denying the Injunction on the Other Grounds Stated in the Petition.

As indicated in the opening statement, the injunction against the Commission's order of December 1, 1931 was sought upon three grounds. In addition to the ground upon which the injunction was granted which has been the subject of discussion in the preceding sections of this Argument, it was also urged:

1. That the rates fixed by the order of December 1, 1931 as shown by the face of the Commission's report, were without evidence of record to justify them as "intrinsically" reasonable as distinguished from "relatively" reasonable.

2. That in refusing to consolidate the case in question with cases involving rates from Wyoming as petitioned by these carriers, the Commission acted so arbitrarily as to deny to petitioners a fair hearing on the question of the intrinsic unreasonableness or reasonableness of the rates under attack from the Midcontinent field.

The District Court passed on each of these grounds and the contentions of the petitioners urged in support thereof and in each instance denied the injunction. That Court is so palpably right in its conclusions that little need be added to supplement the consideration given these contentions by the Court as set forth in its opinion. (273-284)

Under the first ground the petitioners attempt to draw a distinction between "intrinsic" and "relative" reasonableness. A similar contention has been many times urged upon the Commission itself.

In *Sioux City Chamber of Commerce v. B. & O. R. R. Co.*, 120 I. C. C. 7, at page 14, in considering the contention the Commission said:

"Another contention of defendants is that our findings in the original report were that the rates to Sioux City were relatively unreasonable, which they consider equivalent to a finding of undue prejudice, and that they were not intrinsically or absolutely unreasonable. This contention applies to the rates from the docks as well as those from the Illinois mines. It is pointed out that we said that Sioux City's complaint was chiefly one of relationship, and we said that the rates prescribed would properly align the rates to Sioux City with those to surrounding points. It is seldom, if ever, that a rate can be found unreasonable without comparison with the rates to other points. One of the best tests of the reasonableness of a rate is by comparison with the rates on like traffic in the same territory. The interstate commerce act recognizes no distinction between relative unreasonableness and intrinsic or absolute unreasonableness." (120 I. C. C. 14)

See also: *Wyoming Coal Co. v. V. Ry. Co.*, 98 I. C. C. 488, 497; *Nagase & Co. v. D. G.* 62 I. C. C. 422, 426; *Corporation Commission of Vir. v. C. & O. Ry. Co.*, 40 I. C. C. 24, 28.

In *Mellon v. World Publishing Co.* 20 F. (2d) 613, C. C. A. 10th Circuit; 16 F. (2d) 130 U. S. D. C. Okla., which was a case to enforce a reparation award of the Commission where the Commission in its report had said that the rates assailed were "relatively" unreasonable and it was urged that this amounted to a finding of undue prejudice rather than a finding of "intrinsic" unreasonableness, it was held, however, that although the Commission had used the word "relatively" in describing the unreasonableness found, this did not alter the fact that the rates were unreasonable in violation of Section 1 of the Act, as alleged, and that rates found to be unreasonable in their relation to other rates used as the standard of reasonableness, could not be construed to be only unduly prejudicial. Certiorari was denied in that case by this Court, 275 U. S. 561.

In the very nature of things there are only two possible ways of demonstrating that freight rates are too high or too low, First: There are certain situations where the cost of performing the transportation service for which the rate or rates are published, is ascertainable with sufficient accuracy to be entitled to be accorded some probative value. This cost so ascertainable will necessarily bear a direct relation to the volume of traffic used as the basis of the computation. Since the volume of traffic in most instances is a variable that fluctuates with general market conditions, this method of proof is seldom of real probative value in testing future reasonableness. There are undoubtedly instances though where ideal conditions are encountered where cost of service for transportation can be satisfactorily established. These instances would be confined, however, to cases where all of the carrier rates are under review or where if the rates on a single commodity are in question, the traffic of the particular carrier or carriers is so predominantly of the particular commodity as to render the other traffic hauled of little or no accounting significance. Such cost analysis means little unless it can be related to revenues and the return, if any, related to the value of the carrier property. This last requirement injects another variable into the situation under the decisions of this Court holding that cost of reproduction new constitutes an indispensable factor of such value. What is the legal value of a railroad property under these decisions although the identical property is involved, will be one amount one year and quite a different amount another year, depending upon the price level of those things entering into railroad construction. It must be apparent, therefore, that cost analysis as a method of proving rates reasonable or unreasonable for the future, is necessarily limited to a narrow field and even in that field the results are of doubtful probative value in fixing a basis of rates for the future. In

addition to the infirmities inherent in this method of proof, it is a method that is not available to the shippers because even under the elaborate publicity given carrier accounts the basic data for any such study of costs is in the sole possession of the railroads.

The other method of proof is to compare the rates in question with other rates for a similar service, which comparative rates because they were voluntarily established by the carriers themselves or because they were fixed by regulatory authority, acquire a status as "yardsticks of reasonableness" which is judicially recognized. See authorities cited and discussed by the District Court. (282-284)

It is the later method of proof to which the shippers have sole recourse, in the premises. If the probative value of such evidence is now to be questioned, the shipping public will be foreclosed to ever establish violation of Section 1 of the Act in proceedings before the Commission.

Coming to the second ground upon which the injunction was sought, as above stated: This Court, of course, is well versed in the difference between the remedy afforded by Sections 1 and 3 of the Act. If rates are found to be unreasonable in violation of Section 1, the order entered pursuant to such finding requires a reduction to a reasonable basis as found in the report. On the other hand, if rates are found to be unduly prejudicial in violation of Section 3, the order can only require the carrier defendants to remove the undue prejudice. Such order can be complied with by reducing the higher rates charged the complaining shipper or increasing the preferential rate charged the favored shipper.

Because of the influence upon the delivered price of the freight rate from Tulsa (Midcontinent field, Group 3) as referred to parenthetically under the preceding section of this Argument, the relief particularly necessary from the standpoint of these small independent jobbers who were

complaining, was a reduction in the rates from the Midcontinent field. And under the law they were entitled to the reduction if they could prove the rates attacked, were too high.

If the Commission pursuant to the petitions in question had consolidated this case with the Wyoming cases, the consolidated proceeding would, for all practical purposes, have been converted into an undue prejudice consideration under Section 3 and these complainants would have been denied their right to a clean cut trial under Section 1 upon their complaint as made.

Certainly the petitioning railroads were in no way prejudiced as far as the instant case is concerned by the refusal of the Commission to consolidate. They still had the right to and did introduce in evidence in the instant case the question of the level of the rates from Wyoming (Casper as typical) to the destination territory as a measure of what should be reasonable to the same territory from the Midcontinent field. (125) But the complainants were able to use the low level of rates from Casper to other adjacent destinations to demonstrate the unreasonableness of the Midcontinent rates in question. (124-5)

Section 13, paragraph 1 of the Act, (49 U. S. C. A. Section 13, para. 1) provides that in complaint and answer cases before the Commission, if any reasonable ground for investigating such complaint appears:

> "it shall be the duty of the Commission to investigate the matter complained of in such manner and by such means as it shall deem proper."

That the Commission was acting within its powers in refusing the petitions involved, cannot be questioned in the face of the statute.

It is respectfully submitted that the District Court was right in denying the injunction on these two grounds.

CONCLUSION

The decree of the District Court permanently enjoining the Commission's order of December 1, 1931, should be reversed and the injunction vacated.

Respectfully submitted,

PETER B. GARBERG,
For Farmers Union Cooperative Oil Companies.

ELWIN E. HADLICK,
KARL KNOX GARTNER,
For Northwest Petroleum Association.

January 1933